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BRIEFS

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IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

It is undisputed that the federal courts of appeals are divided over an important question affecting millions of employers and employees nationwide: whether an agreement to submit workplace disputes to individual arbitration—and waive class and collective proceedings—is enforceable under the FAA, notwithstanding the NLRA. Lewis agrees that there is a split and quarrels with Epic only about how many federal and state courts are in the divide. That dispute at the margins detracts nothing from the compelling need for this Court to reconcile the lower courts' conflict.

This petition is the ideal vehicle for the Court to do so. It is unique among the pending petitions not only

because it seeks review of the decision that created the circuit split, but also because it seeks review of a fully reasoned opinion that is uncluttered by other issues. Unlike other courts of appeals, the Seventh Circuit below identified, considered, and decided *only* the disputed question. And, unlike the NLRB (and its petition filed by the Solicitor General), the private parties in this case have fixed positions on the question presented that are not dependent on the views of a new Administration. Accordingly, the Court should grant this petition.

ARGUMENT

I. REVIEW IS ESSENTIAL BECAUSE THERE IS A CLEAR SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The parties are in agreement about the existence of a circuit split. To quote Lewis: "Petitioner is correct that the Seventh and Ninth Circuits disagree with the Fifth." Br. in Opp. 14. That concession alone suffices to justify this Court's review, *see* Sup. Ct. R. 10(a)—particularly when added to the chorus of courts that have acknowledged the split. *See, e.g.*, Pet. App. 15a n.† (observing that the decision below "create[s] a conflict in the circuits"); *Riederer* v. *United Healthcare Servs., Inc.*, No. 16-3041, 2016 WL 6682104, at *1 (7th Cir. Nov. 14, 2016) (unpublished order) (describing the "entrenched conflict among the circuits" and "the need" for "the Supreme Court * * * to resolve the conflict"); *Patterson* v. *Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (unpublished summary order) (noting that "[t]he circuit courts * * * are irreconcilably split," with the Second, Fifth, and Eighth Circuits on one side, and the Seventh and

Ninth Circuits on the other), *petition for cert. pending*, No. 16-388 (filed Sept. 22, 2016); *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016) ("recogniz[ing] that our sister Circuits are divided on this question"), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 480 (10th ed. 2013) ("If the lower courts have expressly acknowledged the conflict, * * * [t]his is the best 'evidence' of a genuine conflict.").

Lewis nevertheless insists that review is unwarranted because the split is shallow and likely to resolve itself. Br. in Opp. 9-17. Lewis's argument is flawed three times over.

First, even assuming that Lewis's erroneous reading of the divide in authorities were correct, his argument that a two-to-one circuit split is "shallow" is no reason to deny review. On many occasions this Court has granted review on the basis of a one-to-one circuit split. *See* Shapiro, *supra*, at 242. And it has not hesitated to grant review where, as here, the question presented is an important and recurring one in the area of employer-employee relations, where uniformity and predictability are essential to a harmonious workforce. *See, e.g.*, *Integrity Staffing Sols., Inc.* v. *Busk*, 135 S. Ct. 513, 516 (2014) (two-to-one circuit split); *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 (2006) (two-to-one); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 364 (2002) (one-to-one). Indeed, entities from every side of the dispute have petitioned the Court to decide the question, which is affirmative proof of the compelling need for review. *See* Pet. (employer); *Ernst & Young LLP* v. *Morris*, No. 16-300

(employer); *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (NLRB); *Patterson* v. *Raymours Furniture Co.*, No. 16-388 (employees). And these petitions collectively are supported by 13 different amici—ranging from Public Citizen to the U.S. Chamber of Commerce—all urging this Court to resolve the conflict.

Second, Lewis's assessment of the divide in authorities is inaccurate. The courts are split five-to-two over the question presented. *See* Pet. 7-13. Lewis nevertheless contends that four of the courts on the long side of the divide (the Second and Eighth Circuits, and the California and Nevada Supreme Courts) are not properly included in the count because they answered a different question, *see* Br. in Opp. 9-17—namely, whether the NLRA "qualifies as a contrary congressional command sufficient to overcome the FAA's presumption" that arbitration agreements should be enforced according to their terms, *id.* at 8 (quoting Pet. 3). According to Lewis, that is different from the question decided by the three courts of appeals in the circuit split: whether class waivers are "illegal" under the NLRA and, "if so, whether the FAA's saving clause nonetheless requires their enforcement." *Id.* at 9. In Lewis's telling, the critical distinction is whether a decision "rested * * * on congressional-command" arguments, or instead on "saving-clause arguments." *Id.* at 16; *accord id.* at 33.

Lewis is right that this distinction is critical, but wrong about the reason. All of the cases involve the very same underlying question: whether class waivers in employment-related arbitration agreements are enforceable under the FAA, notwithstanding the NLRA. Pet. i. That different courts have taken

different approaches to answer that question—some emphasizing the saving clause, others asking whether there is a contrary congressional command—is, in part, why there is a split. The courts disagree on how to go about interpreting both the FAA and the NLRA—and their divergent pathways have led to irreconcilable results: Five appellate courts will enforce class waivers in an employment arbitration agreement, and two will not. Pet. 7-13. That inconsistency *is* the conflict. *See* Shapiro, *supra*, at 242 ("A genuine conflict * * * arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Third and finally, the split is unlikely to resolve itself. Parties on all sides of the dispute have recognized as much. *See Murphy Oil* Pet. 22 (No. 16-307) (NLRB) ("There is accordingly little reason to expect the Seventh Circuit's express disagreement with the Fifth Circuit to be resolved without this Court's intervention."); *Patterson* Pet. 28 (No. 16-388) (employees) ("Further delay in resolving this issue will only lead to greater uncertainty. * * * [I]t is critical that this issue be resolved this Term."); Pet. 13 (employer) ("As more courts take a side in this dispute, the split becomes less likely to resolve itself.").

Lewis speculates that courts on the long side of the divide might change their minds now that the Seventh and Ninth Circuits have weighed in. *See* Br. in Opp. 13-17. But that is demonstrably not so. *After* the decision below (issued May 2016), the Second, Fifth, and Eighth Circuits reaffirmed their contrary rulings. *See Employers Res.* v. *NLRB*, No. 16-60034, 2016 WL 6471215, at *1 & n.1 (5th Cir. Nov. 1, 2016)

(per curiam); *Patterson*, 2016 WL 4598542, at *2 (2d Cir.) (issued Sept. 2016); *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (issued June 2016). This strongly suggests that there will be no reconciliation absent this Court's intervention.

Lewis also suggests that further percolation on the question presented is warranted. He is wrong. The divide in authority is intractable, creates a patchwork of inconsistency across the nation over the enforceability of employer-employee arbitration agreements, and leaves employers and employees alike in untenable uncertainty over how their workplace disputes will be resolved. *See, e.g.*, Int'l Ass'n of Def. Counsel Amicus Br. 12 (explaining that "employers across the country *** cannot know whether the lawfulness of their arbitration agreements will be assessed in a jurisdiction that is faithful, or hostile, to such agreements"); Nat'l Ass'n of Mfrs. Amici Br. 3 ("emphasiz[ing] the importance of the issue to employers throughout the country, especially because amici curiae have numerous members with business operations in multiple circuits, and whose arbitration agreements are now enforceable in some jurisdictions but not others"); U.S. Chamber of Commerce Amicus Br. 2 (noting the "broad national importance" of the issue, which affects "employment contracts involving millions of employees"). This uncertainty will not stand for further delay.

Nor would further percolation be helpful for this Court's analysis, in any event. The disputed question presents a pure and straightforward issue of statutory interpretation that has already been vetted

by multiple courts that have fully analyzed both sides of the issue. The time for review is now.

II. LEWIS'S MERITS ARGUMENTS FURTHER PROVE THE EXISTENCE OF AN IRRECONCILABLE CIRCUIT SPLIT.

The bulk of Lewis's brief in opposition is devoted to a merits analysis—either directly (at 18-30) or in the guise of a partial refutation of the divide in authorities (at 9-15), as discussed above. But Lewis's disagreement with Epic's discussion of Court precedent mirrors the disagreement among the lower courts over the meaning of this Court's cases—and reinforces the need for this Court's intervention.

Like the Seventh and Ninth Circuits, Lewis begins with the NLRA and asks whether it *could* be interpreted to protect employees' right to pursue class or collective actions. *See* Br. in Opp. 18-23; Pet. App. 3a-9a; *Morris*, 834 F.3d at 980-984. And like those circuits, he answers that question yes and then invokes the FAA, only to dismiss its relevance because the FAA's saving clause purportedly neutralizes any potential conflict with the NLRA. *See* Br. in Opp. 23-29; Pet. App. 12a-15a; *Morris*, 834 F.3d at 984-990. Epic, on the other hand—consistently with the Second, Fifth, and Eighth Circuits, and the California and Nevada Supreme Courts—starts where this Court has said to start, with the FAA. *See* Pet. 14-15; *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 358 (5th Cir. 2013); *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 295-296, 297 n.8 (2d Cir. 2013); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Tallman* v. *Eighth Jud. Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 140-142 (Cal.

2014). *CompuCredit*'s "contrary congressional command" test, rather than a saving-clause analysis, is the proper standard to apply in cases like this because it determines whether another federal statute (here, the NLRA) abrogates the FAA's mandate that arbitration agreements are to be enforced as written. Pet. 14-20; *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms[,] *** even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." (quotation marks omitted)).

Also like the Seventh and Ninth Circuits, Lewis unsuccessfully tries to distinguish away this Court's most recent cases emphasizing the primacy of federal policy favoring arbitration: *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). *See* Br. in Opp. 28 (arguing that *Italian Colors* and *Concepcion* do not control here because they "analyzed whether judge-made or implicit state statutory policies were incompatible with the FAA"); Pet. App. 15a (describing language from those cases as "dicta"); *Morris*, 834 F.3d at 988 (purporting to distinguish *Italian Colors* and *Concepcion* as cases where the enforcement defenses reflected a rejection of "the adequacy of arbitration proceedings"). Epic, following the majority of the courts to have considered the issue, has explained that *Italian Colors* and *Concepcion* show exactly why Lewis, the NLRB, the Seventh Circuit, and the Ninth Circuit are wrong. *See* Pet. 18-20; *Horton*, 737 F.3d at 358-360; *Owen*, 702 F.3d at 1054; *Sutherland*, 726 F.3d at 297; *Tallman*, 359 P.3d at 123; *Iskanian*, 327 P.3d at 141-

142. *Italian Colors* holds that "courts must rigorously enforce arbitration agreements according to their terms," even "for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command." 133 S. Ct. at 2309 (quotation marks omitted). And *Concepcion* holds that a contractual defense that renders an agreement unenforceable *because* it requires individual arbitration is a defense that "interferes with fundamental attributes of arbitration" in a manner that is "inconsistent with the FAA"—and therefore falls outside the saving clause. 563 U.S. at 344. The Seventh Circuit's failure to follow these fundamental principles is yet another reason why this Court should grant review.

III. THIS CASE IS THE IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is the right vehicle to decide the question presented. Lewis concedes that his lawsuit falls within the parties' agreement to waive class or collective proceedings and individually arbitrate workplace disputes. Pet. App. 24a. This leaves only the purely legal question presented in dispute: whether class waivers in employment arbitration agreements are enforceable.

1. Lewis responds with two arguments, neither of which has merit. He first contends that the court of appeals below did not decide the question presented. Br. in Opp. 30-32. That argument is easily refuted by the face of the petition and the decision below. The petition asks this Court to decide whether an employer-employee agreement to submit workplace disputes to individual arbitration, and waive class and collective proceedings, is enforceable under the

FAA, notwithstanding the NLRA. Pet. i. The Seventh Circuit answered that question no. Pet. App. 1a-2a, 23a.

Tellingly, in making this argument, Lewis never once quotes, cites, or references the actual question presented by the petition. His remade version of the question is cobbled together from different sentences describing what the proper analysis *should* be on the merits of the question presented. *See* Br. in Opp. 10, 30-31 (quoting Pet. 3). This is a repackaging of the same misguided argument as before—that courts supposedly decided different questions when they apply different legal standards. *See supra* pp. 4-5. Lewis's first argument against review on purported vehicle grounds can be readily dismissed.

Lewis's second vehicle-related argument—that the arbitration agreement in dispute offers an alternative basis for the decision below, Br. in Opp. 32-34—is no more compelling than the first. His argument is based on the "savings clause" in Epic's arbitration agreement, which requires the parties to litigate their dispute in court if the class waiver in the agreement is unenforceable. *See* Pet. App. 35a. The question presented, of course, precedes that inquiry by asking whether the class waiver is enforceable in the first place. The arbitration agreement's savings clause thus does not come into play unless and until the question presented is answered in the negative. It is no impediment to review.

2. Of the four pending certiorari petitions asking the Court to reconcile the FAA and the NLRA, the employer petitions—and this one in particular—offer the best vehicles for Court review.

This petition is a better vehicle than *Patterson* for review because, unlike *Patterson*'s short summary order, the decision below offers a fully reasoned opinion that thoroughly aired the issue in a precedential decision. *Compare* Pet. App. 1a-23a, *with Patterson*, 2016 WL 4598542, at *1-3. Plus, the employees' petition in *Patterson* first and foremost asks the Court to grant review of *Murphy Oil*. *See Patterson* Pet. 9, 29 (No. 16-388).

Murphy Oil, however, is a poor vehicle for review. The petitioner in *Murphy Oil* is the NLRB, whose position on the merits could change with the new Administration. *See generally* Nat'l Ass'n of Mfrs. Amici Br. 13-14 n.17 (explaining the NLRB's history of adopting new positions with new administrations). This case, by contrast, involves private parties on both sides of the question. Their positions are not dependent on the views of the new Administration. Also, the decision below is uncluttered by the additional issues decided by the court of appeals in *Murphy Oil*. *Compare* Pet. App. 1a-23a, *with Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017-1020 (5th Cir. 2015), *petition for cert. pending*, No. 16-307 (filed Sept. 9, 2016).[1]

That leaves this petition and *Morris*, both of which offer adequate vehicles to decide the question presented. Of the two, the present petition is the better

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[1] None of the decisions in the split of authority is contingent upon deference to the NLRB. The courts instead have interpreted the statutory language of the FAA and the NLRA directly, and reached conflicting interpretations. So although the NLRB's position on the question presented may change next year, the urgent need for this Court's review will not.

vehicle because the decision below identified, considered, and ruled on only the question presented. *Compare* Pet. App. 1a-23a, *with Morris*, 834 F.3d at 990 ("because the contract's conflict with the NLRA is determinative, we need not—and do not—reach plaintiff's alternative arguments"). And unlike in *Morris*, the arbitration agreement at issue here requires the parties to go straight to arbitration. Pet. App. 30a-35a. The agreement in *Morris*, by contrast, requires mediation as a mandatory first step—raising a distinct question of the legality of that separate channeling requirement. Ex. C to Mot. to Dismiss, No. 4:12-cv-4964-JSW (N.D. Cal. Jan. 11, 2013), ECF No. 42-4. Nevertheless, the Court may wish to grant both employer petitions and order that the cases be heard in tandem—allowing a full presentation on this very important issue and giving the government the opportunity for additional briefing.

* * *

In short, this petition was the first of those now pending on the question presented to be filed. It is not derivative of any other. The decision below contains a fully developed analysis of the legal issue. And it is unencumbered by the potentially superseding issues existing in other cases. The Court therefore should grant this petition, resolve the split of authority, and decide this undisputedly important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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